(16) (10)

Nos. 03-1230 and 03-1234

In the Supreme Court of the United States

AMERICAN TRUCKING ASSOCIATIONS, INC.,
and USF HOLLAND, INC.,
Petitioners,
v
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.,
Respondents.

MID-CON FREIGHT SYSTEMS, INC ET AL.,
Petitioners,
v
MICHIGAN PUBLIC SERVICE COMMISSION, ET AL.,
Respondents.

On Writ of Certiorari
To The Michigan Court of Appeals

BRIEF OF RESPONDENTS

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QUESTIONS PRESENTED

1. Whether the $100 fee upon vehicles conducting intrastate operations violates the Commerce Clause of the United States Constitution.

2. Whether the $100 fee upon vehicles operating solely in interstate commerce is preempted by 49 USC 14504.

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STATEMENT

A. The Michigan Motor Carrier Act.

The intrastate fee and the interstate fee at issue in these consolidated cases are part of a fee system contained in the Michigan Motor Carrier Act, Mich Comp Law (MCL) 475.1 *et seq*, that was originally enacted in 1933 to promote safety and conserve the use of Michigan highways. While the motor carrier transportation industry provides a public service, it also increases the risk of harm to the traveling public and damage to the public highways. J.A. 17. Because of that, the Motor Carrier Act requires motor carriers to pay their share of the costs associated with promoting safety upon and conserving the public highways through regulating motor carriers' use of the highways and assessing certain privilege fees and taxes. J.A. 17.[1] Under MCL 478.6, all fees collected under the Motor Carrier Act are placed to the credit of the Michigan Public Service Commission (MPSC) and the motor vehicle highway fund.

The motor carrier fees collected under the Motor Carrier Act go to the MPSC and the Motor Carrier Division of the Michigan State Police administration of that Act and for safety enforcement of the motor carrier industry. J.A. 21-22. Among the safety functions enforced are: vehicle requirements (e.g. brakes, oversize, overweight, load securement); driver requirements (e.g. hours of service, medical certificates); drug and alcohol testing requirements; safety inspections and audits; regulation of movement of hazardous waste. J.A. 12, 29-30. The Motor Carrier Division, through agreements, also enforces federal

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[1] According to the 1993-1994 National Association of Regulatory Utility Commissioners (NARUC) compilation of transportation regulatory policy, 45 States and U.S. Territories have some form of regulation of common carriers. The vast majority of these States and Territories also regulate insurance (45 States), safety (33 States) as well as the registration of interstate carriers (37 states). Thirty-nine States also assess a fee for intrastate registration of motor carrier operations. Thirty-two States or Territories utilize an identification device for vehicles such as a decal or stamp. A few States also regulate private carriers. J.A. 21.

requirements under Title XII of Pub L 99-570 and the Federal Motor Carrier Regulations, that are administered by the Federal Highway Administration of the U.S. Department of Transportation. J.A. 30. The enforcement of federal standards by the States with respect to motor carriers is not unusual. As Thomas Lonergan, Director of the Motor Carrier Regulation Division of the MPSC, noted in his affidavit regarding the enforcement of the Single State Registration System (SSRS), "[t]he ICC [Interstate Commerce Commission] has none of its own police officers or enforcement people to enforce ICC requisite requirements and relies on states for this purpose under the SSRS system." J.A. 20.

1. The Intrastate Fee.

Under MCL 478.2(1), motor carriers operating intrastate holding a certificate of authority issued by the MPSC are required to purchase a decal for each power unit for a fee of $100.[2] J.A. 23. This decal is affixed to the door of the vehicle and identifies that the carrier has paid the fee. J.A. 23. Each calendar year the decal must be replaced. J.A. 23. MCL 478.2(1) further authorizes a six-month decal for a fee of $50 after July 1. Also, under MCL 478.2(3) a motor carrier may purchase a temporary 72-hour permit for a fee of $10.[3] Therefore, such a motor carrier that is only involved in occasional or incidental intrastate commerce may obtain a $10 temporary permit. J.A. 63-64.

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[2] Before purchasing an intrastate decal, a for-hire motor carrier wishing to operate in Michigan, must first obtain a certificate of authority under MCL 478.1. J.A. 23. Neither this certificate requirement nor its corresponding fee are challenged in this case.

[3] In order to purchase a temporary 72-hour permit a motor carrier must have a certificate of authority under MCL 478.1 and have at least one truck with a MCL 478.2(1) intrastate decal. According to the MPSC's 2004 Annual Report a total of 4,928 temporary 72-hour permits were issued. See, <http://222.michigan.gov/documents/2004mpsc_annual_report_117786 _7. pdf>(accessed March 24, 2005)

The intrastate fee is the largest source of revenue for motor carrier regulatory functions performed by the MPSC and the Michigan State Police, Motor Carrier Division. J.A. 24. In the calendar year 1994, the MPSC collected approximately $2,905,000 in intrastate vehicle decal fees. J.A. 24.

2. The Interstate Fee.

The interstate fee is authorized by MCL 478.2(2). The fee is $100 per calendar year per vehicle, or $50 after July 1. J.A. 24. A decal identical to the intrastate decal is issued and affixed to the door of the vehicle. J.A. 24. The fee is paid by an interstate motor carrier on vehicles registered and licensed plated through the Michigan Secretary of State. J.A. 24. An interstate motor carrier that license-plates its vehicles in any other state or province does not pay this fee. J.A. 24. In the calendar year 1994, the MPSC collected approximately $751,000 in interstate vehicle decal fees.

B. The Michigan Court of Appeals Decision.

The Michigan Court of Appeals below upheld both the MCL 478.2(1) intrastate fee and the MCL 478.2(2) interstate fee, as lawful regulatory fees. The Court held that the intrastate fee did not violate the Commerce Clause since it did not raise a significant barrier to participation in interstate trade. It found that the Petitioner American Trucking Associations' (ATA) claim that MCL 478.2(1) burdened interstate commerce was "a matter of pure speculation" and that the ATA "present[ed] no evidence that any trucking firm's route choices are affected by the imposition of the fee, only surmising that this could occur in the hypothetical." J.A. 101. The Court held that any effect the intrastate fee had on interstate commerce was incidental and did not rise to the level of discrimination. The Court of Appeals determined that the fee served a legitimate and non-discriminatory purpose and held that this was "an exercise of the State's police power and serves a critical function in protecting the people who use Michigan's highways." *Id.* It then concluded, "[o]n the basis of record before us, we cannot say that

the burden imposed on interstate commerce by the $100 annual fee is clearly excessive in relation to Michigan's substantial interest in regulating safety on its highways." J.A. 102.

The Michigan Court of Appeals also rejected the claim of the Petitioners Mid-Con Freight Systems, Inc., *et al* (collectively Mid-Con) and held that because the interstate fee was a regulatory fee and not a registration fee, it was not preempted by 49 USC 14504. J.A. 83-84. Petitioners ATA and Mid-Con both filed applications for leave to review to the Michigan Supreme Court, that were denied. 469 Mich 969; 673 NW2d 753 (2003).

SUMMARY OF ARGUMENT

In 03-1230, citing this Court's decision in *American Trucking Ass'ns, Inc v Scheiner,* 483 US 266 (1987), ATA argues that the intrastate fee violates the Commerce Clause because it is discriminatory and not fairly apportioned. In *Scheiner,* however, this Court held that a flat state tax or fee will not be held to be discriminatory when it is the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens. Such is the case here inasmuch as anything other than a flat fee would be both impracticable and pose an administrative burden.

The intrastate fee is fairly apportioned in that the fee does not constitute a tax on the interstate business' unitary income, but is rather assessed on a discrete event that can only occur in a single state. Moreover, in a line of cases beginning with *Osborne v Florida,* 164 US 650 (1897), this Court upheld the validity of a flat tax, that is not imposed upon the business of the company that is interstate, reasoning that no harm results to the company since it can freely conduct its interstate business without paying the slightest heed to an intrastate fee or tax.

ATA argues that this Court may look solely to the structure of the intrastate fee to see whether it's internally consistent, and with nothing more, make a determination that its practical consequences discriminates against interstate commerce. This

Court, however, has never struck down a law that did not facially discriminate as internally inconsistent by relying on a hypothetical taxpayer with a specific structure of factors and taxable income. As to determining the practical consequences, the Respondents believe the better view is that a fee or tax, that is not facially discriminatory, should only be held to be internally inconsistent if the structure of the tax can be shown by actual evidence to burden interstate commerce. As this Court noted in *Nippert v City of Richmond,* 327 US 416, 431 (1946) in judging the validity of a tax, it is "its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern." The Court then cautioned that "[t]o ignore the variations in effect which follow from application of the tax to highly different fact situations is only to ignore those practical consequences." *Id*

ATA's reading of this Court's decisions would achieve a radical and unsettling result whereby broad categories of flat, unapportioned state fees, such as annual business licenses or professional licenses would be at risk. Even more concerning is that all these laws would be placed in jeopardy based upon a calculus of hypothetical facts that dispenses with the need for actual, proven facts of discrimination.

ATA's argument that the Michigan Court of Appeals' decision constitutes a manifest evasion of this Court's precedents fails to pay heed to the important policy considerations at issue in this case. The Michigan Court of Appeals, two federal circuits and a State supreme court have all determined that the power of a State or municipality to regulate an activity to protect the safety and welfare of citizens and to charge a fee to help defray the regulatory costs incurred should be judged according to the balancing test employed by this Court in *Pike v Bruce Church, Inc*, 397 US 137, 142 (1970). Such a view represents a fair balancing of the interests involved in the competing concerns between the Commerce Clause and a State's police power.

In 03-1234, Mid-Con asks this Court to overturn the Michigan Court of Appeals' decision that the interstate fee is not preempted by federal law, specifically the Single State Registration System (SSRS), 49 USC 14504. Mid-Con argues that the plain language of Section 14504 expressly capped the per-truck fee at $10 that State regulatory commissions may levy against interstate motor carriers and that the Michigan Court of Appeals erroneously read into Section 14504 a non-existent regulatory exception.

As is clear from the text of Section 14504 itself and well as its legislative history, Section 14504 relates solely to the fees that a State may charge for filing proof of insurance and registration of its federal authority with the State. The Michigan interstate fee has nothing to do with the registering of the motor carrier's federal authority with the State. Michigan's interstate fee is assessed against Michigan-plated vehicles to help defray the safety and administrative costs of the MPSC and the Motor Carrier Division of the Michigan State Police. The Michigan Court of Appeals correctly interpreted Section 14504 and properly found that MCL 478.2(2) was not preempted.

ARGUMENT

I. The intrastate fee does not violate the Commerce Clause.

The Commerce Clause provides that "Congress shall have the Power . . . [t]o Regulate Commerce . . . among the several States." US Const, art I, § 8, cl 3. "Though phrased as a grant of regulatory power to Congress, the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc v Dep't of Environmental Quality of the State of Oregon*, 511 US 93, 98 (1994).

In *Western Live Stock v Bureau of Revenue*, 303 US 250, 254 (1938), this Court noted that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce

from their just share of state tax burden even though it increases the cost of doing the business." In *Complete Auto Transit, Inc v Brady*, 430 US 274, 279 (1977), the Court noted that its prior decisions established that it is not the formal language of the tax statute but rather its practical effect that is determinative. The Court then held that a state tax would survive a Commerce Clause challenge when the tax (1) is applied to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State. *Id.*

ATA's primary argument is that the intrastate fee is a tax that does not satisfy the second and third prongs of the test in *Complete Auto* and is contrary to this Court's decision in *American Trucking Ass'ns, Inc v Scheiner*, 483 US 266 (1987). While the Respondents do not agree that the intrastate fee is a tax (see Argument I.C. *infra*), it is clear that it is nonetheless valid when analyzed under these cases.

A. The intrastate fee does not discriminate against interstate commerce.

1. MCL 478.2(1) is not a protectionist measure but rather is a law that addresses legitimate local concerns with only incidental effects on interstate commerce.

This Court has held that, when analyzing any law under the negative Commerce Clause, the first step is to determine whether it regulates even-handedly with only "incidental" effects on interstate commerce or discriminates against interstate commerce. *Oregon Waste Systems*, 511 US at 99 (1994). Although this Court has never precisely delineated the scope of the doctrine that bars discriminatory taxes, it has held that "discrimination" simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter. *Id.* Generally, a tax will fail Commerce Clause scrutiny if it discriminates on its face or if, on the basis of a "sensitive, case-by-case analysis of purposes and effects, the provision" will in

practical operation work discrimination against interstate commerce by providing a direct commercial advantage to local business. *West Lynn Creamery v Healy,* 512 US 186, 201 (1994); *Bacchus Imports, Ltd v Dias,* 468 US 263, 268 (1984). In short, the "crucial inquiry" is to determine whether the fee or tax is basically a protectionist measure or whether it can fairly be viewed as a law directed towards legitimate local concerns, with effects on interstate commerce that are only incidental. *Philadelphia v New Jersey,* 437 US 617, 624 (1978).

The intrastate fee under MCL 478.2(1) is imposed uniformly on both in-state and out-of-state vehicles. Therefore, it is not facially discriminatory. Nor does the fee constitute a protectionist measure since it does not erect a barrier to entry. Payment of the fee is not required of a motor carrier vehicle wishing to conduct interstate operations on Michigan highways. Lastly, the intrastate fee under MCL 478.2(1) is plainly directed toward legitimate local purposes, i.e., funding safety and related regulations, a point specifically noted by the Michigan Court of Appeals below. (MCL 478.2(1) "is an exercise of the state's police power and serves the critical function in protecting the people who use Michigan highways." J.A. 101.)

Citing this Court's decision in *Scheiner*, ATA argues that the intrastate fee is discriminatory. In *Scheiner*, the Court held that a flat marker fee and a flat axle tax assessed by Pennsylvania on each truck traveling through the state -- whether registered there or not -- violated the Commerce Clause. The Court found that the flat taxes imposed a substantially higher effective rate on trucks registered outside of Pennsylvania, with the lower effective tax rate inuring to the benefit of the local truckers. The Court noted that "[p]ermitting the individual States to enact laws that favor local enterprises at the expense of out-of-state business 'would invite a multiplication of preferential trade areas destructive' of the free trade which the Clause protects." *Id,* 483 US at 269, n 1. In this context, the Court added that "the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of-state businesses that compete in an interstate market than it

imposes on its own residents who also engage in commerce among the States." *Id,* 483 US at 282. The Court, however, specifically created an exception to its holding. And it is that exception that sustains the constitutional validity of the intrastate fee.

2. In *Scheiner*, this Court held that a flat tax does not violate the Commerce Clause when it is the only practicable means of collecting revenue from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens.

In *Scheiner*, the Court held that "the precedents upholding flat taxes can no longer support the broad proposition advanced by [Pennsylvania], that every flat tax for the privilege of using a State's highways must be upheld even if it has a discriminatory effect on commerce by reason of that commerce's interstate character." *Id* at 296. The Court, however, was careful to say that:

> Those precedents are still valid, however, in their recognition that the Commerce Clause does not require the States to avoid flat taxes when they are the only practicable means of collecting revenues from users and the use of a more finely gradated user-fee schedule would pose genuine administrative burdens. [*Id*]

This Court further defined the nature of this exception referring to two earlier decisions. The first was *Aero Mayflower Transit Co v Bd of Railroad Comm'rs*, 332 US 495 (1947) where the Court rejected a claim that a minimum fee of $15 in a fee structure based on gross receipts was unreasonable even though it would result in a tax fifteen times greater than if the standard percentage calculation had been used and stated:

> [The] Federal Constitution does not require the state to elaborate a system of motor vehicle taxation which will reflect with exact precision every gradation in use. In

> return for the $15 fee appellant can do business grossing $3,000 per vehicle annually for operating on Montana roads. Appellant was not wronged by its failure to make the full use of the highways permitted. [*Id* at 506, n 19.]

This Court in *Scheiner* then noted that "[o]ur disposition [in *Aero, supra*] was thus based on the costs the State would encounter in collecting taxes for vehicles that earned less than $3,000 annually in Montana." 483 US at 296, n 26.

The other case cited in *Scheiner* was *Capitol Greyhound Lines v Brice,* 339 US 542 (1950), in which the Court upheld a 2% fee on the fair market value of motor vehicles for the use of state highways because of the administrative burden of applying a tax formula that would vary "with every factor affecting appropriate compensation for road use." *Scheiner,* 483 US at 296, n 26, quoting 339 US at 546. Thus, a more finely tuned apportionment would be unworkable given the myriad of factors needed to effect a fair apportionment.

Thus, this Court's holding in *Scheiner* plainly does not require the invalidation of all flat taxes. Instead, when administrative realities prevent the use of more precise levies, unapportioned flat taxes are permitted under the Commerce Clause.

(a) The intrastate fee fits the *Scheiner* exception since no data system is available to fairly apportion the fee and to devise and implement one would pose genuine administrative burdens.

The intrastate fee fits the *Scheiner* exception since the use of a more finely gradated user-fee schedule poses genuine administrative burdens and the fee under MCL 478.2(1) is the only practicable means of collecting revenues. This was pointed out in the second supplemental affidavit of Thomas R. Lonergan, the MPSC's Director of the Motor Carrier Division, when he said:

> Plaintiffs suggest that the $100 per vehicle fee [478.2(1)] must be apportioned in some manner, such as mileage, but there is no data accumulation system available which could be used to separate miles traveled intrastate versus interstate. MCL 478.2(1) is based on transportation of intrastate shipments, and although the IRP [International Registration Plan] requires motor carriers to declare in advance the number of miles traveled by each vehicle in each state, there is no declaration of intrastate miles charged. Therefore, the IRP system could not be used for mileage data of intrastate operations.
>
> To devise a system based upon mileage would require accumulated data as to the number of intrastate shipments, the weight of such shipments, etc. to reach a reasonable apportionment of interstate versus intrastate revenue. This would make telephone service separations look simple. Both the motor carriers and the State of Michigan would need to devise complex systems for determining fee liability, billing, auditing and so forth. This approach appears to be administratively inefficient for the amount of fee revenue collected per year, approximately $3.5 million involving 3,000 motor carriers. [J.A. 64.]

As Mr. Lonergan states, there is no data accumulation system available that would permit the fair apportionment of the intrastate fee. Moreover, Mr. Lonergan says that to fairly apportion the intrastate fee, various other factors would need to be considered. Mr. Lonergan's statement thus establishes that apportionment of the intrastate fee would be impracticable, and would pose genuine administrative burdens in attempting to devise and collect the necessary data to allow for a fair apportionment.

(b) The use of a more finely gradated fee is impracticable in light of the amount of the fee involved.

Implicit in both *Aero Mayflower* and *Brice* is a finding that the fees assessed were nominal, particularly in relation to the value being conferred on the taxpayer. When compared to *Aero Mayflower* and *Brice*, the actual charge levied by MCL 478.2(1) is similarly nominal. For example, the $15 fee charged in *Aero Mayflower* in 1947 is equal to $123.63 in 2003 using the Consumer Price Index.[4]

The nominal "burden" imposed by the $100 fee in MCL 478.2(1) may be even further reduced, as the statute provides for two further reductions of the amount. First, MCL 478.2(1) provides that a motor carrier is to pay a fee of $50 per vehicle if the carrier begins intrastate operations after June 30. Second, MCL 478.2(3) further authorizes the MPSC to issue a temporary 72-hour permit to a certificated motor carrier at a fee of $10. As Respondents noted to the trial court below:

> [A] motor carrier that is only involved in occasional or incidental intrastate commerce would not have to pay $100 per vehicle pursuant to MCL 478.2(1). When an intrastate opportunity arises a motor carrier can obtain a $10.00 temporary permit. A motor carrier could operate for up to 30 days using the 10 cards before reaching the equivalent of the $100 decal fee. [See, Second Supplemental Affidavit of Thomas L. Lonergan, J.A. 63-64.]

[4] In 2003, $15.00 from 1947 is worth $123.63 using the CPI index; $102.17 using the GDP deflator; $221.86 using the unskilled wage; $334.73 using the GDP per capita; and, $674.69 using the relative share of GDP. See, Economic History Services, <http://www.eh.net.> (accessed March 24, 2005)

Thus, even if the intrastate fee under MCL 478.2(1) is considered to be a tax, it does not violate the Commerce Clause because it falls within the exception set forth in *Scheiner*.

B. The Intrastate Fee is fairly apportioned.

ATA claims that the intrastate does not satisfy the second prong of the *Complete Auto* test, i.e., that it is not fairly apportioned. Since 1983, this Court has used the principle of "internal consistency" when determining whether a state tax is fairly apportioned under the Commerce Clause.

In *Container Corp of America v Franchise Tax Bd*, 463 US 159, 169 (1983), this Court first suggested that a state tax, in order to be valid under the Commerce Clause, must have "what might be called internal consistency – that is, the [tax] must be such that, if applied by every jurisdiction, it would result in no more than all of the business' income being taxed." In *Armco, Inc v Hardy*, 467 US 638 (1984), the Court again applied the internal consistency test, striking down a West Virginia business and operation tax. The Court held that because the interstate manufacturer was subjected to a multiple tax burden that was not placed on an intrastate manufacturer the tax created an "impermissible interference with free trade." *Id* at 644. In 1987, again using the internal consistency test, the Court struck down a similar business and operations tax in *Tyler Pipe Industries v Washington Dep't of Revenue*, 483 US 232 (1987). On the same day the Court issued its decision in *Tyler Pipe*, it used the internal consistency test in *American Trucking Ass'ns, Inc v Scheiner, supra*, to strike down two Pennsylvania highway use taxes.

The Court's most recent description of the internal consistency test was in *Oklahoma Tax Comm v Jefferson Lines, Inc*, 514 US 175 (1995), which reviewed Oklahoma's state sales tax on bus tickets sold in Oklahoma for interstate travel. Jefferson Lines, a Minnesota corporation, provided bus services as a common carrier in Oklahoma without remitting the 4% sales tax for tickets it had sold in Oklahoma for bus travel from Oklahoma to other states, although it did collect and remit the

taxes for all tickets it had sold in Oklahoma for travel that originated and terminated within that state. Since Jefferson Lines did not challenge the tax on intrastate operations, this Court reviewed the interstate portion of the tax under the four-pronged test of *Complete Auto*. Applying the internal consistency test to Oklahoma's sales tax on bus tickets sold in Oklahoma for interstate travel originating there, this Court, 514 US at 185, said:

> Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.

ATA argues that the internal consistency test, as applied in *Scheiner*, requires the invalidation of Michigan's intrastate fee. ATA contends that interstate carriers that transport one load between two points in Michigan, as part of their overall operations are unconstitutionally subject to the full $100 intrastate fee. They contend that in the course of an interstate haul, a truck that is passing through Michigan cannot 'top off' its load by transporting an additional load between two points in Michigan unless it has paid the $100 fee. According to the ATA, because the intrastate fee authorized by MCL 478.2(1) is a flat, non-apportioned fee it fails to satisfy the internal consistency test.

It should first be noted that the intrastate fee does not resemble the fees in *Scheiner*. While the flat marker fee and flat axle tax in *Scheiner* applied to all trucks traveling through Pennsylvania, Michigan's intrastate fee relates solely to those vehicles assigned by the carrier to haul intrastate loads within Michigan. Vehicles hauling only interstate loads do not pay a fee under MCL 478.2(1). Michigan's regulatory statutes and fees do not relate to or adversely affect the Federal Highway

Administration (FHA) interstate authority. Thus, unlike *Scheiner*, where a vehicle operating in interstate commerce could be subject to multiple axle taxes (if all States enacted them), regardless of how little travel was made in a State, a fee like Michigan's cannot result in multiple fees for interstate transportation. Thus, no multiple fees can result. If the carrier elects to conduct intrastate transportation in multiple States, then it may be subject to additional State fees. But, such a hypothetical was not addressed in *Scheiner*.

ATA then concludes that flat taxes, such as the intrastate fee, must necessarily fail the internal consistency test for two reasons. (ATA Brief, p 13.) First, it is argued that such a tax results in multiple taxation and second that interstate commerce is discriminated against because it imposes a higher effective per-mile rate on interstate trucks than on trucks that confine their operating to the taxing state. *Id.*

ATA's analysis, however, effectively eliminates the distinction between interstate commerce and intrastate commerce. The express wording of the Commerce Clause seeks to ensure that there is free trade "among the several States." Thus, the answer to the threshold question of whether the intrastate fee hinders the maintenance of a free trade area among the several States is that there is no basis, other than ATA's hypothetical and unproven claims, to prove that it does.

1. If a multiple tax burden may be said to exist, it is not one that offends the Commerce Clause in that it is limited to discrete intrastate transactions.

ATA argues that the intrastate fee is not internally consistent because if all 48 contiguous States were to impose a flat $100 fee on an interstate truck when conducting intrastate operations in each State it would result in a cumulative, or multiple tax burden of $4,800. Quoting this Court's decision in *Scheiner*, 483 US at 285, n 20, ATA (Brief, pp 14-15) claims that flat levies like the Michigan fee "bear much more heavily in the aggregate on a firm

that sells in many places than on a firm otherwise identical ... that sells in only one place." The foregoing quote from *Scheiner*, however, was made with respect to Pennsylvania fees that were different from the Michigan fee here. The Pennsylvania fees applied to all vehicles traveling its highways regardless of whether they were engaged in interstate or intrastate operations. In other words, the Pennsylvania fees plainly constituted an entry fee to engage in interstate commerce on Pennsylvania's highways. That is not the case here since a motor carrier's truck may use Michigan highways to conduct interstate operations without being subject to the fee under MCL 478.2(1). Thus, the fee imposed by MCL 478.2(1) applies only to trucks undertaking at least some point-to-point intrastate hauls in Michigan. This presents no danger of multiple taxation of those hauls since only the Michigan intrastate transportation, that cannot occur in any other State is being assessed. Moreover, the intrastate fee is internally consistent in that it does not constitute a tax of the business' unitary income. Where a "tax is assessed not on unitary income, but on discrete events, such as sale, manufacture and delivery, which can only occur in a single State or in different States that apportionment principle is not applicable; there is simply no unitary figure or event to apportion." *Tyler Pipe, supra,* 483 US at 256 (Scalia, J., dissenting.)

A line of this Court's cases support this contention since they subjected flat taxes on a transportation companies' intrastate routes to a more relaxed scrutiny than on their interstate routes. In *Osborne v Florida, supra,* 164 US at 654, the Court upheld a flat license tax that was applied to and affected only that portion of the business that was done in the state and was local in character. In upholding the tax, this Court stated:

> So long as the regulation as to the license or taxation does not refer to and is not imposed upon the business of the company which is interstate, there is no interference with that commerce by the state statute.
>
> * * *

> The statute herein differs from the cases where statutes upon this subject have been held void, because in those cases the statutes prohibited the doing of any business in the State whatever unless upon the payment of the fee or tax.
>
> * * *
>
> Here, however, under the construction as given by the state court, the company suffers no harm from the provisions of the statute. It can conduct its interstate business without paying the slightest heed to the act, because it does not apply to or in any degree affect the company in regard to that portion of its business which it has the right to conduct without regulation from the State. [164 US at 655.]

This holding is in harmony with the distinction between the fees invalidated in *Scheiner* and the intrastate fee under MCL 478.2(1). The fees charged in *Scheiner* made no distinction between interstate and intrastate hauls and a motor carrier could not conduct any interstate business in Pennsylvania without first paying the fees. Like *Osborne,* but unlike *Scheiner,* the intrastate fee relates solely to intrastate activity.

The holding in *Osborne* was subsequently followed in a number of other cases decided by this Court. In *Pullman Co v Adams,* 189 US 420 (1903), the Court upheld a Mississippi partially - flat tax against a company that operated railroad sleeping cars that carried both interstate and intrastate passengers in the same cars. Mr. Justice Holmes, speaking for a unanimous court noted that, "the company cannot complain of being taxed for the privilege of doing a local business which it is free to renounce." *Id* at 422. Similarly, flat taxes were upheld in *Bode v Barrett,* 344 US 583, 585 (1953) and *City of Chicago v Willet Co,* 344 US 574, 580 (1953).

2. The practical consequences claimed by ATA are hypothetical and have not been proven.

ATA argues this *Osborne* line of cases has no place under this Court's current approach that looks to the practical consequences of the tax or fee. It is wrong, however, to assert that the logic in *Osborne* is no longer employed under the Court's modern decisions. For example, in *Commonwealth Edison v Montana,* 453 US 609, 617 (1980), this Court upheld a 30% severance tax Montana levied on each ton of coal mined in that State, rejecting the notion that there was multiple taxation, saying:

> Nor is there any question here regarding apportionment or potential multiple taxation, for as the State Court observed, "the severance can occur in no other state" and no other state can tax the severance.

Similarly, the intrastate shipment in this case can only occur in Michigan and Michigan alone can assess a fee for that shipment.

The *Osborne* cases should not be swept aside because they correctly note that there are valid distinctions between interstate and intrastate commerce, particularly with respect for the State's right to regulate legitimate local concerns pursuant to its police powers. Under ATA's approach, intrastate commerce ceases once an interstate business wishes to conduct a local, intrastate transaction. The existence of intrastate commerce then becomes dependent upon the identity of the regulated company and whether it is from out-of-State, rather than the nature of the activity that is occurring. The practical consequence of ATA's approach is that the state boundaries are no longer irrelevant. This is because of the identity of the person being regulated is being used to determine whether an activity (that is otherwise entirely local in character and does not cross state boundaries) affects interstate commerce. Such an approach is every bit as formulistic, as earlier approaches, such as *Spector Motor Service v O'Connor,* 340 US 602 (1951) that have been rejected by this Court.

Lastly, the practical consequences, as claimed by ATA, are speculative since the record does not establish either the existence or the extent of any competitive disadvantage or actual burden being placed on interstate commerce by MCL 478.2(1). ATA, however, citing earlier court decisions, argues that there is "no need for an empirical demonstration that a flat tax discourages interstate commerce." (ATA Brief, p 28.) The Respondents respectfully disagree.

3. A finding of internal inconsistency of a tax that is not facially discriminatory should be based on the application of concrete facts.

ATA argues that there is no need for an empirical demonstration that the flat tax discourages interstate commerce. (ATA Brief, p 28.) ATA's assertion in response to the brief by the United States supporting the grant of certiorari. (ATA Brief, p 29, n 13.) The United States suggested remanding the case for the Michigan Court of Appeals to develop a record on whether Michigan's fee scheme affects out-of-state carriers disproportionately.[5]

ATA cites *Bacchus Imports; Chemical Waste Mgmt, Inc v Hunt,* 504 US 334 (1992); *Oregon Waste Sys; Fulton Corp v Faulkner,* 516 US 325 (1996); *Camps Newfound/Owatonna v Town of Harrison,* 520 US 564 (1997); and *Jefferson Lines, supra,* for the proposition that no evidence or extent of discrimination must be demonstrated where a state tax discriminates. But the fees or taxes that were the subject of these cases were not like Michigan's intrastate fee. Unlike Michigan's fee, they did not provide a mechanism that ameliorates any potential discriminatory affect on interstate commerce. Under the Michigan fee structure a Michigan certificated motor carrier that wants to top off a load or conduct an intrastate haul can do so and

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[5] Respondents, as noted in their supplemental brief, oppose giving ATA an opportunity to develop a factual record on remand. ATA chose not to support their claims with facts when required to do so under the Michigan Court Rules. Summary disposition, was therefore properly entered against ATA.

pay only a $10 fee rather than the $100 decal fee. None of the fees or taxes that were the subject of the cases cited above had such a feature.

Michigan's fee is unlike the fees addressed in these cases because the Michigan fee targets intrastate activity. In the cases cited above, the invalidated taxes and fees were pointedly directed at interstate commerce. In *Bacchus,* certain alcoholic beverages produced in Hawaii enjoyed a tax preference over alcoholic beverages produced in other States. In *Chemical Waste* and *Oregon Waste* Alabama and Oregon subjected waste generated outside of their States to higher fees than waste generated within their States. In *Fulton* it was a credit for intangibles tax that was based on the amount of the corporation's income that was subject to North Carolina corporate income tax. North Carolina residents paid intangibles tax on the value of corporate stock that they owned. The more activity the corporation conducted in North Carolina the larger the tax credit. Again a clear burden on interstate commerce.

Only in *Scheiner* did Pennsylvania provide a temporary pass in lieu of the axle fee, one of the taxes at issue in *Scheiner.* But Pennsylvania did not provide any such relief from the $25 I.D. marker fee, which is more similar to Michigan intrastate fee. The Court did not discuss whether Pennsylvania's five day pass in lieu of the axle fee provided constitutional relief in *Scheiner.* Michigan's intrastate fee is different since it regulates intrastate activity. Moreover, by providing an alternative $10 fee, Michigan allows a carrier that only infrequently makes intrastate deliveries an alternative to the annual $100 fee. This is not equivalent to a fee based on mileage in Michigan as ATA seems to insist is necessary. But the $10 fee does limit a carrier's burden based on the frequency of intrastate deliveries.

There is no empirical demonstration that the alternative $10 fee does not provide relief to interstate carriers that may wish to occasionally top-off an interstate delivery with an intrastate delivery. Absent an empirical demonstration that $100 fee in

tandem with the $10 fee burdens interstate commerce, the intrastate fee should not be invalidated. ATA would have the Court invalidate the fee simply because it is $100 annual charge, not apportioned by mileage. ATA does not acknowledge that opportunity to pay the $10 fee in lieu of the annual fee provides a constitutional circuit breaker. This is a flat fee that is not based on highway usage. Nonetheless, it also provides an alternative for the occasional intrastate haul.

ATA asks the Court to invalidate Michigan's fee structure because it contains an annual $100 fee. This Court, however, looks to the entire statute when interpreting the effect of a particular provision. See e.g., *Bennett v Spear,* 520 US 154, 174 (1997). Thus, the Court should examine the entire structure of the fee, and not as ATA urges, strike down the statute without a demonstration that there is, in fact, discrimination.

ATA stakes out an untenable position. ATA would have every State fee fall if an interstate actor paid the fee. The United States correctly noted that the record did not establish that the fee did indeed burden interstate commerce. Before striking Michigan's intrastate fee, or any other State fee, this Court should ensure that the State has truly transgressed. Michigan requires an annual payment of $100 for the privilege of making intrastate deliveries. A motor fuel tax, for instance, would not be limited to intrastate transactions but would also fall on those operating solely in interstate commerce. There has been no showing that there is another practical method for assessing a fee on intrastate deliveries.

As to the practical consequences, the Respondents maintain that the better view is a tax is internally inconsistent only if the structure of the tax has been shown to burden interstate commerce through the introduction of concrete facts. Hypothetical "facts" should not form the basis for a determination that a regulatory fee that does not discriminate on its face lacks internal consistency. Indeed, as the Minnesota Supreme Court noted in *In re: Alternative Minimum Tax Refund Cases,* 546 NW2d 285, 290

(1996), this Court "has never found a violation of internal consistency by relying on the existence of a purely hypothetical taxpayer with a specific structure of factors and taxable income, to justify striking down a law that was not facially discriminatory."

ATA's citation to *Nippert,* 327 US at 431, is puzzling given that the transaction there was later characterized by this Court as being "essentially interstate" (*Dunbar-Stanley Studies, Inc v Alabama*, 393 US 537, 540 (1969). Moreover, in *Nippert,* 327 US at 431, this Court plainly indicated the critical importance of concrete facts when determining the practical consequences of a tax:

> It is no answer, as appellee contends, that the tax is neither prohibitive nor discriminatory on the face of the ordinance; or that it applies to all local distributors doing business as appellant has done. *Not the tax in a vacuum of words, but its practical consequences for the doing of interstate commerce in applications to concrete facts are our concern. To ignore the variations in effect which follow from application of the tax, uniform on the face of the ordinance, to highly different fact situations is only to ignore those practical consequences.* In that *blindness* lies the vice of the tax and of appellees position. [footnote omitted; emphasis added.]

ATA, however, seeks to have this Court implement a review that incorporates a "blindness" to "concrete facts" when determining whether a state fee or tax is reviewed under the Commerce Clause.

Finally, ATA's approach would result in a disparity in the degree of evidence necessary to prove a burden on interstate commerce under the separate Commerce Clause tests employed by this Court. Under the *Pike v Bruce Church* test, used to analyze state regulations, no undue burden will be found where the burden is only incidental where the State regulates

evenhandedly. Under the *Complete Auto* test, used to analyze taxes and as interpreted by ATA, there is no corresponding level of "incidental burden" on interstate commerce that is allowed. Under ATA's zero-tolerance approach, only the State tax structure is analyzed and if a hypothetical construct can be advanced that yields the *potential* of multiple taxation, the tax is deemed to violate the Commerce Clause without regard to practical, or actual consequences, that are based on facts. It is no answer to say that the *Scheiner* exception is equivalent to an incidental burden because the burden in *Scheiner* is not related so much to the burden it places on interstate commerce as it is to the administrative burden it places on the State. The level of proof necessary to an "incidental burden" under either the *Pike* or *Complete Auto* test should be roughly similar. The approach advocated by ATA, however, results in an unwarranted and unwise disparity. Simply put, the problem with the approach argued by ATA is that it sacrifices a State's ability to regulate and to defray the costs of that regulation, over matters that pose legitimate local concern for vague and unproven benefits to interstate commerce.

4. ATA's argument, if accepted, would jeopardize any unapportioned flat state or local fee or tax.

The approach advocated by ATA could have a profound impact on existing state taxing structures, as *any* unapportioned flat state or local tax would necessarily fail under the internal consistency test.

As one commentator has noted "[t]he implications of this conclusion are rather unsettling," since several broad categories of state exactions would be in jeopardy, including: state fees and taxes on domestic and foreign corporations when first organizing or qualifying to do business in the state; annual business license taxes for carrying on trades and occupations; and professional and similar license fees. See Hellerstein, *Is 'Internal Consistency' Foolish?; Reflections on an Emerging Commerce Clause Restraint on State Taxation*, 87 MICH L REV 138, 154-155 (1988). Moreover, it is difficult to imagine how such fees could

ever be fairly apportioned. Would a fishing license to an out-of-state angler need to be apportioned based on the number or the size of fish caught? Or should State bar dues for an out-of-state attorney be apportioned according to the amount of revenue earned in the State? There is no need to embark upon the journey that ATA would have this Court take, since all such local, intrastate activities are properly subject to the State's police powers to regulate. Similarly, the State should be able to assess fees covering such intrastate activities to help defray the costs of regulation to protect the health, safety and welfare of its citizens.

C. The Michigan Court of Appeals correctly analyzed the intrastate fee under the Commerce Clause in accordance with this Court's decisions.

The Michigan Court of Appeals correctly concluded that *Scheiner* was not applicable to the intrastate fee since the test used in *Scheiner* and *Complete Auto* applies to taxes and not regulatory fees. ATA derides this decision as a "manifest evasion of this Court's precedents." (ATA Brief, p 22.) Moreover, ATA portrays the Michigan court's decision as if it were the only decision to hold that a regulatory fee, enacted pursuant to police powers to protect safety, health and welfare of the citizenry, should be distinguished from a tax. ATA fails to discuss similar holdings from the U.S. Courts of Appeals for the Sixth and Tenth Circuits and the Supreme Court of Washington. The distinction between a fee and a tax, as employed by the Michigan Court of Appeals in its Commerce Clause analysis, is constitutionally valid and is consistent with the decisions of this Court.

1. Other decisions distinguish regulatory fees from taxes under the Commerce Clause.

The U.S. Courts of Appeals for the Sixth and Tenth Circuits have distinguished a fee from a tax when determining its validity under the Commerce Clause. In *Interstate Towing Ass'n v City of Cincinnati,* 6 F3d 1154 (6th Cir, 1993), the Sixth Circuit upheld a Cincinnati ordinance that required the licensing of all tow trucks that tow vehicles from locations within the city limits to other city

locations, or to locations outside the city. The plaintiff association, citing this Court's decision in *Scheiner,* claimed the ordinance impermissibly burdened interstate commerce, arguing that it facially discriminated against Indiana and Kentucky towing companies, because they allegedly bore an unequal burden of the fees paid. The Sixth Circuit, citing *Maine v Taylor,* 477 US 131, 138 (1986), held that since the ordinance did not on its face "affirmatively discriminate" against interstate transactions, it did not automatically trigger heightened judicial scrutiny. 6 F3d at 1162.

The Sixth Circuit held that *Scheiner* was clearly distinguishable since the City's $80 fee could not properly be characterized as a user fee, as was the tax in *Scheiner*. 6 F3d at 1162. The Sixth Circuit found the City's fee to be different because it was assessed to help defray the costs of inspecting towing vehicles to ensure that all trucks providing towing services within City limits, Ohio-based and out-of-state-trucks alike, meet certain standards of safety. *Id.* In short, the Cincinnati fee was not charged for the privilege of using the City's streets, nor are City- or Ohio-based tow trucks exempt from the fee. Thus, State boundaries were "entirely irrelevant" to the fee. *Id.*

The Sixth Circuit rejected the contention that the fee resulted in a higher "per mile" cost to out-of-state towing companies, saying:

> While the burden of the fee is indeed less, as a percentage of revenue, for those firms that do more business in Cincinnati, this has nothing to do with the towing company's home *state*. And the fact that some of the firms on which the fee may fall more heavily, due to infrequent trips to the City, are based across state borders does not render the fee impermissible.
>
> The City deems safety, minimum levels of service, and consumer protection necessary for the provision of towing

services within its borders. Such concerns have consistently been regarded as legitimate, innately local in nature, and presumptively valid, even where regulations enacted to address those concerns have an impact on interstate commerce. [6 F3d at 1162-1163 (footnote omitted; citation omitted; emphasis in original).]

The Sixth Circuit also rejected the plaintiff association's claim that the Cincinnati Ordinance unduly burdened interstate commerce, because it failed the internal consistency test, saying:

Ours is not a case, however, in which the City has imposed a tax only "for the privilege of making commercial entrances into its territory," *id.* at 284, 107 S Ct at 2840, but one where the City is simply trying to regulate what it reasonably thinks is a potentially dangerous or troublesome activity carried on within its borders. As we have discussed, towing services are essentially local in nature, and give rise to legitimate local concerns about safety, consumer protection, and the like. And again, just because Cincinnati, or any other municipality, happens to be located on a state border does not alter this essential character of towing, transforming an otherwise local service into "interstate motor carriage" and rendering the otherwise neutrally applicable provisions of the Ordinance "impermissible burdens" on interstate commerce.

* * *

In the final analysis, this sort of regulation--local business regulation that applies to those within the city in precisely the same way as it does to those without--is properly overseen by the local political process, not the Commerce Clause. [6 F3d at 1165-1166 (footnotes omitted).]

Similarly, the Tenth Circuit in *V-1 Oil Co v Utah,* 131 F3d 1415 (10th Cir, 1997), upheld a Utah act that provided that a person could not sell, transport, dispense or store liquefied petroleum gas (LPG) without first obtaining a state license and

paying licensing and certification fees. The Tenth Circuit applied Utah law and determined that the charges were regulatory fees as opposed to taxes since they were used "to help defray the costs of inspecting LPG facilities and to ensure that all LPG handlers providing LPG services within the state of Utah meet minimum standards of safety." *Id* at 1423. The Tenth Circuit then upheld the license fees using the three-factor test set forth in *Pike. Id.*

The Supreme Court of Washington in *Franks and Sons v Washington,* 966 P2d 1232 (1998) upheld a gross weight regulatory fee that was used to fund a motor carrier safety program. Citing *Scheiner,* the plaintiff claimed that the fee was effectively a tax that was not internally consistent and violated the Commerce Clause. The Washington Court disagreed, saying that a regulatory fee is different from a tax:

This dichotomy is more than semantics because, where regulatory fees have been found not discriminatory, apportionment, and therefore the internal consistency test, has not been at issue in the majority of cases. [*Id* at 1238.]

That Court then noted that the differences between a tax, which is imposed under a state's taxing power, while a fee is imposed under a state's regulatory power.[6] Moreover, revenues from a fee are used exclusively for the purpose of financing regulation whereas revenues from a tax may be used for other purposes. The Washington Court then cited *Union Pac RR Co v*

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[6] This Court in *Commonwealth Edison v Montana, supra,* 453 US at 622, n 12, similarly noted that there is a difference between taxes and fees, saying:

As the Court has stated, "such imposition, although termed a tax, cannot be tested by standards which generally determine the validity of taxes." *Interstate Transit, Inc. v. Lindsey,* 283 U.S. 183, 190 (1931). Because such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services, we have required a showing, based on factual evidence in the record, that "the fees charged to not appear to be manifestly disproportionate to the services rendered...."

Public Util Comm, 899 F2d 854 (9th Cir, 1990), in which the Ninth Circuit held a similar regulatory fee imposed by Oregon was not a tax and therefore fell outside the scope of the prohibition in the Railroad Revitalization and Regulatory Reform Act (4-R Act) on state taxes that discriminate against rail carriers. The Court in *Franks and Sons*, 966 P2d at 1238-1230, then quoted with approval the Ninth Circuit's statement that:

> The concerns underlying the constitutional limitations imposed on the taxing power by article I, section 8 are relevant to measures having the primary objective of raising revenues for the general support of government, but not to measures having the primary objective of regulating commerce. Thus, a levy to collect the costs of regulation from those regulated is not to be treated as a tax to which the limitations of article I, section 8 apply. *Union Pac RR Co,* 899 F2d at 859 (citations omitted).

Whether an exaction is a tax or a fee depends on whether its purpose is to raise revenue or to regulate an industry or services. See, e.g., *National Cable Television Ass'n v United States,* 415 US 336, 340-341 (1974). A tax is defined as a levy made for the purpose of raising revenue for a general governmental purpose; a fee is enacted principally as an integral part of the regulation of an activity and to cover the cost of regulation. *Franks and Sons,* 966 P2d at 1239.

The Washington Court declined to apply the *Complete Auto* test saying that there were policy reasons that the apportionment rationale should not be extended to nondiscriminatory regulatory fees. In particular, the Washington Court noted that if regulatory fees must be apportioned, then a whole host of local fees, designed to offset legitimate costs of regulation could be at risk. *Id* at 1240-1241. Based on its analysis, the Washington Supreme Court then utilized the three-factor test set forth in *Pike* and concluded the fee regulated evenhandedly with only incidental effects on interstate commerce, served a legitimate local purpose and could not be accomplished through alternative means.

2. The Michigan Court of Appeals' decision correctly balanced the State's police power with the Commerce Clause.

The Michigan Court of Appeals, like the Washington Supreme Court in *Franks and Sons,* examined the burden the fee imposes on interstate commerce and evaluated that burden according to this Court's decision in *Pike,* 397 US at 142 (1970) that stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. *Huron Cement Co v. Detroit,* 362 U.S. 440, 443; 4 L. Ed. 2d 852, 856; 80 S. Ct. 813; 78 ALR 2d 1294. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with less impact on interstate activities.

This balancing test inherently recognizes that state regulation may have some effect upon interstate commerce, yet such regulation will not be invalid for that reason alone. Rather, the test balances the local and interstate interests involved.

MCL 478.2(1) constitutes a valid exercise of the state's police power. This was aptly noted by the trial court below:

> The interest furthered by that fee, viz., ensuring that vehicles and carriers operating on Michigan highways in intrastate commerce comply with MCL safety and fitness norms, is an exercise of state police power and the legitimate expression of the state's concern that the welfare of its citizens be protected. That interest plainly does not leave a prejudicial effect on interstate commerce

and thus does not impact the Commerce Clause. [03-1234, Petition, Appx. 49.]

This Court has declared that the Commerce Clause does not withhold from the States the power to regulate matters of local concern where Congress has not exercised its power, even though the regulation affects interstate commerce. In *Lewis v BT Investment Managers, Inc,* 447 US 27, 35-36 (1980), the Court stated that the Commerce Clause "limitation upon state power . . . is by no means absolute" and that "[i]n the absence of conflicting federal legislation, the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected."

As the Michigan Court of Appeals noted, the Petitioners, "do not contest that the statute serves a legitimate non-discriminatory purpose, i.e., funding safety and related regulations." J.A. 101. Even though a statute enacted under the police powers of the state may affect interstate commerce, it does not translate into a burden on such commerce. For example, in *Huron-Portland Cement Co v Detroit,* 362 US 440 (1960), this Court held that a local air control ordinance was not unconstitutional as a burden on interstate commerce when it was applied to steam vessels operating in interstate commerce that were licensed and comprehensively regulated by the federal government. The Court found that the city code was an exercise of the police power, and that "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce." 362 US at 447. The Court concluded that "[s]tate regulation, based on the police power, which does not discriminate against interstate commerce or operate to disrupt its required uniformity, may constitutionally stand." (362 US at 448.)

The application of the *Complete Auto* test to the intrastate fee under MCL 478.2(1) ignores this valid exercise by the State to protect the welfare and safety of its citizens. Moreover, it does so

without any balancing of the interests involved. As such, it results in a disparity in the degree of scrutiny to be applied to a state statute that seeks to regulate to protect a state's citizenry. If a regulation that does not assess a fee is challenged under the Commerce Clause that state regulation may be subject to a balancing test whereby a factual analysis is undertaken to determine the level of the burden on interstate commerce. Should the same statute, however, impose a fee to defray the costs of regulation, it then becomes subject to an analysis of the "structure" of the fee where the person challenging the regulatory statute may prove, through hypothetical "facts" alone, that the burden on interstate commerce is undue.

Finally, the Respondents disagree with ATA's argument that *Scheiner* requires the apportionment of the intrastate fee. In *Scheiner*, the fees that were charged were used to fund general highway maintenance and repairs. Here the fees are used to underwrite the costs of various safety measures such motor carrier education, etc. This Court has not specifically determined whether an unapportioned fee used exclusively to fund regulatory safety activities should be reviewed under the same standard. Furthermore, while mileage may be an appropriate yardstick to use to reimburse a State for the use of its highways that does not necessarily hold true for reimbursing a State for its safety activities. Police departments routinely perform safety related functions yet those who benefit by those services are generally not taxed or assessed according to the frequency or magnitude of their use. Thus, the Michigan Court of Appeals correctly analyzed the intrastate fee as a regulatory fee subject to a Commerce Clause under the test in *Pike*.

II. The Michigan statute that charges a $100 annual fee for each motor carrier vehicle that has a Michigan license plate and is operating in interstate commerce is not preempted by 49 USC 14504.

Section 14504 was enacted by Congress as part of the Intermodal Surface Transportation Efficiency Act of 1991, to simplify the process of interstate motor carriers registering their

Interstate Commerce Commission (ICC) with the States. As this Court noted in *Yellow Transportation v Michigan,* 537 US 36, 40 (2002), "[u]nder the new system, called the Single State Registration System [SSRS] 'a motor carrier [would be] required to register annually with only one State', and 'such single State registration [would] be deemed to satisfy the registration requirements of all other States.'" The SSRS imposed a $10 cap on the per-vehicle registration fee that participating States could charge interstate motor carriers. Michigan is a participating State and charges registration fees authorized by the SSRS under MCL 478.7.

MCL 478.2(2) is part of a comprehensive regulatory scheme regulating motor carriers and charges a $100 annual fee for each motor carrier vehicle having a Michigan license plate and operating in interstate commerce. As noted in the Statement, revenues from the $100 fee are used by the State to defray the costs of regulatory safety enforcement.

Mid-Con's principal argument is that in Section 14504 Congress preempted the States from assessing interstate motor carriers any vehicle fees in excess of the $10 SSRS registration fee (Mid-Con Brief, p 23.) The United States supports Mid-Con and argues that MCL 478.2(2) is preempted by Section 14504 because it singles out interstate carriers for the charging of a fee based on the interstate character of their operations.

There is no preemption in this case. Neither the text of Section 14504 nor the Congressional purpose behind it support the expansive reading urged by Mid-Con. Moreover, it is clear from a review of the Michigan Motor Carrier Act as well as the MPSC's administration of that act that the charging of the fee to interstate carriers under MCL 478.2(2) is not based solely on their interstate operations.

A. Section 14504 does not preempt a state law enacted under the State's police powers unless that was the clear and manifest purpose of Congress.

This Court, in *New York Blue Cross v Travelers Ins,* 514 US 645, 654-655 (1995), summarized the scope of federal preemption analysis as follows:

> Our past cases have recognized that the Supremacy Clause, U.S. Const., Art. VI, may entail pre-emption of state law either by express provision, by implication, or by a conflict between federal and state law. . . . And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law. . . . Indeed, in cases like this one, where federal law is said to bar state action in fields of traditional state regulation, . . . we have worked on the "assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." [Citations omitted.]

Thus, "[t]he critical question in any pre-emption analysis is always whether Congress intended that federal regulation supersede state law." *Louisiana Public Service Comm v Federal Communications Comm,* 476 US 355, 369 (1986). Furthermore, as this Court noted in *Cipollone v Ligget Group, Inc,* 505 US 504, 517 (1992), "[c]ongress' enactment of a provision defining the preemptive reach implies that matters beyond that reach are not pre-empted."

State regulatory power will not be deemed preempted by federal regulation unless Congress has "unmistakably so ordained." *Florida Lime and Avocado Growers v Paul,* 373 US 132, 142 (1963). An expressed intent to nullify a state regulatory program will not be lightly inferred. *Cf. Pacific Gas & Electric*

Co v California Energy Resources Conservation and Development Comm, 461 US 190 (1983). This is particularly so where, as here, the police power of the state is implicated. In *City of Columbus, et al v Ours Garage and Wrecker Service, Inc,* 536 US 424, 444 (2002), this Court observed:

> Preemption analysis "starts with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic, Inc. v. Lohr,* 518 U.S. 470, 485, 135 L. Ed. 2d 700, 116 S. Ct. 2240 (1996) (internal quotation marks and citation omitted). Section 14501(c)(2)(A) seeks to save from preemption state power "in a field which the States have traditionally occupied." *Ibid.* (internal quotation marks and citation omitted).

City of Columbus involved federal preemption of any state action in the area of scheduling and rates for motor carriers of passengers, and the explicit exception to that preemption found at Section 14501(c)(2), preserving to the States the authority to regulate in matters of safety. The same preemption analysis employed in *City of Columbus* applies to the instant case. Congress has not, in Section 14504, expressed a clear and manifest intent to supplant the State's historic police power in the area of motor carrier safety with the limited registration requirements contained in Section 14504.

B. Section 14504 does not manifest an intent to preempt state laws having a separate and distinct purpose unrelated to the registration of an interstate carrier's ICC authority with the states.

1. The text of Section 14504, by its own terms, concerns the registration of a motor carrier's federal authority with the States.

With the SSRS, Congress eliminated the burdens associated with the multiple State registrations of an interstate carrier's

federal authority, and also established a fee system to minimize the cost of filing a proof of insurance. The specific requirements of the SSRS are set forth in Section 14504(c)(2) as follows:

> (A) **Evidence of certificate; proof of insurance; payment of fees.** – Under the amended standards implementing the single State registration system described in paragraph (1) of this subsection, only a State acting in its capacity as registration State under such single State system may require a motor carrier holding a certificate or permit issued under this subtitle –
>
> (i) to file and maintain evidence of such certificate or permit;
>
> (ii) to file satisfactory proof of required insurance or qualification as a self-insurer;
>
> (iii)to pay directly to such State fee amounts in accordance with the fee system established under subparagraph (B)(iv) of this paragraph, subject to allocation of fee revenues among all States in which the carrier operates and which participate in the single State registration system; and
>
> (iv)to file the name of a local agent for service of process.
>
> (B) **Receipts; fee system.** – such amended standards –
>
> * * *
>
> (iv)shall establish a fee system for the filing of proof of insurance as provided under subparagraph (A)(ii) of this paragraph that (I) will be based on the number of commercial motor vehicles the carrier operates in a State and on the number of States in which the carrier operates, (II) will minimize the costs of complying with the registration system, and (III) will result in a fee for each participating State that is equal to the fee, not to exceed $10 per vehicle, that such State collected or charged as of November 15, 1991; and . . . .

The scope of the standards authorized by Section 14504 relates only to those forms and procedures required by federal regulations to prove lawfulness of transportation by motor carrier. Section 14504 seeks only to provide the motor carrier with the benefit of registering their ICC authority in one state, for each of the states for which they intend to operate.

Thus, while Congress did, with the enactment of the SSRS, preempt a State from charging more than $10 for filing proof of insurance to operate within the borders of that State, it did not concurrently preempt the State from charging other fees to those interstate vehicles that are licensed in that State. Indeed, the United States recognizes that, notwithstanding the SSRS, States remain free to levy a variety of other fees and taxes (United States Brief, p 16). Thus, the SSRS was not intended, and did not, relieve a motor carrier from paying any and all State fees related to motor carrier vehicles.

2. The legislative history of 49 USC 14504 evidences a Congressional intent to only streamline standards related to the registration of a motor carrier's federal authority with the States.

Section 14504 was amended in 1965 in response to a need to control illegal interstate for-hire trucking. Pub L 89-170, 79 Stat 648 (September 6, 1965). The House noted that such illegal operators represented a "continuing concern" and that despite past legislative activity, "illegal for-hire trucking continues to be a significant problem today." H R Rep No. 253, 89th Cong, 1st Sess, *reprinted in* 1965 USCCAN 2923, 2924. Much of the remedy for this problem was addressed by adoption of additional civil enforcement provisions to be used by the ICC. In addition, there was an acknowledgment that States had attempted to help control the problem by requiring registration of ICC authorized carriers, but there was no uniformity in such State requirements. Hence, uniformity would be required. *Id.* It was specifically noted that the federal standards to be adopted under 49 USC 14504 were "to evidence the lawfulness of interstate operations of a carrier within a State. . . ." *Id* at 2928.

There is no basis for the proposition that state regulatory fees were to be considered "proof of legality of interstate operations." Indeed, it was specifically noted that:

> the purpose of such registration is to enable state enforcement officials to identify motor carriers hauling, on a for-hire basis, commodities subject to regulation and thus take on-the-spot action against those who have not the authority to do so. This, in effect, means that we want to encourage the states in helping the ICC keep unlawful interstate motor carriers off the highway. (111 Cong. Rec. 9672 (May 6, 1965) (statement of Rep. Harris, Chairman, Committee on Interstate and Foreign Commerce.)

Nothing here justifies the argument that Congress intended to deprive the States of their ability to otherwise regulate in the public interest, or to prevent the states from assessing regulatory fees. The Senate was consistent in its characterization of its version of the legislation, noting that the standards defined therein were to "evidence the lawfulness of interstate operations of a carrier," by registration of ICC certificates, proof of insurance and designation of agents for service of process. S Rep No. 387, 89th Cong, Sess, 4-5 (1965) at 4-5. Thus, the need for registration and identification requirements to be uniform was to assist the federal and State governments in addressing the problem of uncertificated, illegal interstate operators, not to eliminate fee-funded State regulatory programs.

C. The interstate fee under MCL 478.2(2) is unrelated to the registration of an interstate carrier's proof of insurance with the States.

MCL 478.2(2) is part of a comprehensive fee system, and provides for a $100 fee for each motor carrier vehicle that is operating entirely in interstate commerce and is license-plated in Michigan:

> (2) A motor carrier licensed in this state shall pay an annual fee of $100.00 for each vehicle operated by the motor carrier which is registered in this state and operating entirely in interstate commerce.

The regulatory fee provided for in MCL 478.2(2) is not required to prove an interstate carrier is properly certified under federal authority. It is not required to prove that a carrier's motor vehicles are legally registered. It is not required to prove that the carrier is insured, or that it has a named agent for service of process. The interstate fee provides funds that enable Michigan to enforce the Motor Carrier Act; the Motor Carrier Safety Act, MCL 480.11 *et seq*; the Michigan Vehicle Code, MCL 257.1 *et seq*; and the Fire Prevention Act, MCL 29.1 *et seq*. J.A. 24-25, 46-47. In short, it is a fee used to defray the costs of regulation and has nothing to do with proving that an interstate vehicle is properly certified or insured under Section 14504. Thus, MCL 478.2(2) is not within the preemptive scope of Section 14504.

D. MCL 478.2(2) neither conflicts with nor stands as an obstacle to the purposes of the SSRS.

There is no conflict between Section 14504 and MCL 478.2(2). The former provides for a single state registration to prove the lawfulness of transportation by a motor carrier and specifies registration requirements in terms of filing and maintaining ICC certificates, registering motor vehicles, filing proof of insurance and filing the names of registered agents. MCL 478.2(2) does not intrude upon such registration requirements, and does not impose any additional burdens upon motor carriers in terms of proving the lawfulness of its transportation. Rather, MCL 478.2 places a regulatory fee of $100 on each vehicle licensed in Michigan to pay for the administration of the Motor Carrier Act. There simply is no conflict between the state and federal law.

There has been no showing that motor carriers cannot effectively comply with both the federal and state law. While clearly hoping to avoid paying the regulatory fee assessed by

Michigan, there is no record support for the proposition that motor carriers cannot physically comply with both laws. The record would indeed imply just the opposite.

Lastly, MCL 478.2(2) does not obstruct the execution of the objectives underlying the enactment of Section 14504. Motor carriers continue to utilize the SSRS for purposes of registration, and payment of the $100 regulatory fee to Michigan has not proven to jeopardize the continued viability of the SSRS. The implementation of the SSRS and MCL 478.2(2) have not proven to be mutually exclusive, and Section 14504 should not, on such a tenuous and unproven basis be found to preempt the Michigan regulatory fee at issue here.

E. The preemption arguments advanced by Mid-Con and the United States lack merit.

Mid-Con argues that the plain meaning of Section 14504 does four things: (1) restricts State registration of interstate carriers to register with a single base State; (2) prohibits the collection of per-vehicle fees by any State other than the base State; (3) bans vehicle-specific identification and registration; and (4) preempts per vehicle fees in excess of $10 by any participating State (Mid-Con Brief, p 14.) However, the mere fact that such restrictions and limitation exist is not controlling on whether MCL 478.2(2) is preempted. What is controlling is whether, in accordance with Congress' preemptive purpose, those restrictions and limitations apply to the fee charged under MCL 478.2(2). So while the plain meaning of Section 14504 establishes these restrictions and limitation on registration fees under the SSRS, that does not mean they preempt the MCL 478.2(2) fee.

In arguing that Section 14504 preempts Michigan's interstate fee, Mid-Con and the United States take different paths. Mid-Con argues that the Michigan Court of Appeals erred when it determined that there was a presumption against preemption and that its construction is a "classic example of elevating form over substance." (Mid-Con Brief, p 17.) The United States argues that the text of Section 14504(b), the subsection in which Congress

defined its preemptive purpose, establishes preemption of the interstate fee, which it characterizes as "exorbitant."

The argument (Mid-Con Brief, pp 15-16) that Section 14504 pertains to a matter so inherently federal in character that the Michigan Court of Appeals below erred when it stated that there was a "presumption against federal preemption" lacks merit. In an attempt to extricate itself from that presumption, Petitioner Mid-Con cites to *Chicago & North Western Transportation Co v Kalo Brick & Tile Co*, 450 US 311 (1981), in support of the argument that the Interstate Commerce Act represents a comprehensive federal regulatory scheme which permits no presumption against preemption. This Court in *Chicago & North Western* did not, as Mid-Con suggests, simply dismiss the state law as preempted by this "comprehensive regulatory scheme," but rather framed the inquiry in this manner:

> In deciding whether respondent's state-law damages action is pre-empted, we must determine what Congress has said about a carrier's ability to abandon a line, what Iowa state law provides on the same subject, and whether the two are inconsistent. To these tasks we now turn. [450 US at 319.]

This approach is fully consistent with the preemption analysis advanced by Respondents here. Moreover, whether there is a presumption against preemption is not determinative of whether Section 14504 preempts the interstate fee. What controls is the language of the two statutes and, in particular, Congress's purpose in enacting the federal law. In this regard, the United States correctly looks to the text of Section 14504(b) to determine whether the fee charged under MCL 478.2(2) is the type of fee subject to the restrictions and limitations in Section 14504.

As to the argument that regulatory/registration concept is a distinction without a difference, Mid-Con erroneously claims that the MPSC "waives" the "federally compliant $10 fee." (Mid-Con Brief, p 7.) A reading of MCL 478.7(4) plainly discloses that the

MPSC only has the authority to charge the $10 fee to interstate motor carrier vehicles that are not plated in Michigan. The MPSC cannot waive the payment of $10 for Michigan plated vehicles when it has no power to require such a payment in the first place. There is no "registration" fee for Michigan plated vehicles under MCL 478.7. Nor does the SSRS registration form (J.A. 65-67) used by the MPSC transform the $100 fee in MCL 478.2(2) into a registration fee. In fact, the SSRS registration form clearly indicates that vehicles plated in Michigan are not to be listed on the SSRS registration form but are instead to use another form. (P-344-T.) The Michigan Legislature, in prior enactments, has regarded the fees charged under MCL 478.2(2) and 478.2(1) to be regulatory fees, whereas the fee charged under MCL 478.7(4) to be a registration fee. This conclusion is supported by an examination of legislative amendments to the Michigan statutes.

In 1988, the MCA was amended by 1988 PA 347, which raised the annual fee under MCL 478.2 from $50 to $100 and, in MCL 478.7, established for the first time an annual registration fee for interstate carriers licensed in another state for registering the carrier's ICC authority. Later that same year, the Michigan Legislature passed 1988 PA 369. This act added MCL 478.8, that states:

> The increase in the annual fee from $50.00 to $100.00 in section 2 of this article provided by Act No. 347 of the Public Acts of 1988 for a motor carrier licensed in this state and the new registration procedure instituted in section 7 of this article by Act No. 347 of the Public Acts of 1988 shall take effect January 1, 1990.

As the foregoing demonstrates, the Michigan Legislature expressly differentiated between the fee in MCL 478.2 and the "registration procedure" in MCL 478.7.

Contrary to Mid-Con's claim, the decision below does not create a dangerous loophole since the SSRS, the IRP and safety

regulation, along with the fees charged to defray the costs of that regulation, are three separate and distinct areas under the law. As previously noted, the SSRS seeks to reduce the burden of motor carriers registering their ICC operating permits with the States. The intended scope of that enactment is reflected in its language and does not extend to safety regulatory measures. The International Registration Plan (IRP) is defined at 49 USC 31701 as the "interstate agreement" on apportioning vehicle registration fees paid by motor carriers, developed by the American Association of Motor Vehicle Administrators. Similarly, the IRP relates only to registration requirements for the purposes of obtaining license plates. It does not include safety regulations. This is evidenced by Pub L 105-277, Div C, Title I, Oct. 21, 1998, 112 Stat 2681-586 that relates to the registration of trailers (container chassis) and the apportionment of fees for such registration in accordance with the IRP. Subsection (c) notes, however, that:

> (c) SAFETY REGULATION.--This section shall apply to registration requirements only and shall not affect the ability of the State to regulate for safety.

Thus, Congress viewed State safety regulations as being separate from the IRP. MCL 478.2(2) does not create a loophole when it regulates an area not covered by the SSRS or IRP.

Even though the payment of the fee under MCL 478.2(2) has no relationship whatsoever to the carrier's filing of its federal registration with Michigan, the United States argues that it is nonetheless preempted. It arrives at this conclusion by analyzing the two sentences contained in the "General Rule" in Section 14504(b) that states:

> (b) **General rule**.—The requirement of a State that a motor carrier, providing transportation subject to jurisdiction under the subchapter I of chapter 135 and providing transportation in that State, must register with the State is not an unreasonable burden on transportation

> referred to in section 13501 when the State registration is completed under standards of the Secretary under subsection (c). When a State registration requirement imposes obligations in excess of the standards of the Secretary, the part in excess is an unreasonable burden.

The United States argues that when these two sentences are read together, State requirements that interstate carriers "must register with the State" are preempted as a general matter if they do not conform to the standards governing the SSRS, regardless of whether or not those state requirements are specifically worded in terms of a carrier's registration of its federal certificate with the State. (United States Brief, p 19.)

This, however, is not what Section 14504(b) says. The first sentence of that subsection says when the State registration is completed under the standards set forth in subsection (c) (i.e. maintaining evidence of certificate, filing satisfactory proof of insurance, etc.) there is no burden. The second sentence says that when a State imposes a registration requirement in excess of the standards in subsection (c), then those registration requirements constitute an unreasonable burden.

The argument by the United States that any State requirement, not just State registration requirements, are preempted proves too much. Within the context of the two sentences themselves, there are no words to indicate that State requirements, not linked to registering a motor carrier's federal certificate, are nonetheless preempted. Indeed, the United States admits as much when it says that there is "no indication that the current Section 14504(b), any more than its predecessor, was intended to preempt state laws and fees in traditional areas of state regulation, such as those governing registration and license plating of trucks under the IRP." (United States Brief, p 19.) But Section 14504(b) does not give the United States the power to pick and choose which State laws and fees in traditional areas of state regulation are deemed preempted and which are not. The regulation and enforcement of safety measures on motor carrier vehicles traveling on Michigan

highways is no less a traditional area of state regulation than the registering and plating of those vehicles.

The claim that Section 14504 preempts MCL 478.2(2) because it imposes distinct burdens on a class of interstate motor vehicles, based on the interstate character of their operations is mistaken. It is clear that the $100 fee is imposed on motor carrier vehicles that are "operating entirely in interstate commerce." It is this language alone, the United States argues, that singles these vehicles out for disparate treatment based on their interstate conduct. But it is also clear that there are other equally important factors that must be taken into consideration.

The fee in MCL 478.2(2) is not required of all interstate motor carrier vehicles. It is expressly limited to those that are Michigan-plated. The fact that MCL 478.2(2) only refers to those Michigan plated vehicles, however, does not mean that Michigan law "distinguishes between entities that serve a principally interstate clientele and those that primarily serve an intrastate market." See, e.g., *Camps Newfound/Owatonna, Inc,* 520 US at 576. The Court should not ignore the practical effect of MCL 478.2(1) and MCL 478.2(2), and should recognize that when taken together, the two provisions impose a $100 fee on every for-hire vehicle license-plated in Michigan, regardless of the nature of its operations.[7] The United States suggests that the Respondents can neither properly argue nor can the Court properly reject the claim that MCL 478.2(2) is not preempted by the SSRS because it's part of a larger statutory regime that, when considered as a whole, does not discriminate against interstate commerce. (United States Brief, p 26.) The problem with this approach, however, is that this Court looks to the entire statute when interpreting the effect of a particular provision. *Bennett v Spear, supra,* 520 US at 174.

[7] It should be noted that in addition to Michigan-plated vehicles paying a $100 fee, either under MCL 478.2(1) or 478.2(2), other for-hire motor carrier vehicles, not plated in Michigan, that perform intrastate operations will pay the intrastate fee under MCL 478.2(1).

MCL 478.2(2) clearly should be read in conjunction with MCL 478.2(1) which requires a fee similar to that challenged here for motor carriers licensed in Michigan and operating intrastate.[8] When construed together, it is clear that the $100 fee required by the Michigan statutory regime operates as a regulatory fee on all for-hire motor carrier vehicles license-plated in Michigan. Therefore, the effect of MCL 478.2(2) is that a vehicle license-plated in Michigan is not excused from such a regulatory fee just because it is engaged in interstate commerce.

Finally, there is no merit to the United States' claim that the $100 fee in MCL 478.2(2) is exorbitant. Such a claim is only true when and is strictly dependent on whether it's the type of fee preempted by the SSRS. Thus, if it is not subject to preemption, it cannot be classified as an exorbitant fee. Indeed, the IRP, 49 USC 31707, expressly provides that there is no limit on the amount of money a state may charge for registration of a commercial motor vehicle or the amount of any fuel use tax a State may impose. Similarly, this court noted in *Scheiner, supra,* 483 US 271, 282, that registration and plating of a commercial truck can run into the thousands of dollars. Against this backdrop, the $100 amount of the fee in MCL 478.2(2) cannot be classified as exorbitant.[9]

[8] In *United States v Freeman,* 44 US 556; 3 How 556, 564-565; 11 L Ed 724 (1845), this Court observed:

> The correct rule of interpretation is, that if divers statutes relate to the same thing, they ought all to be taken into consieration [sic] in construing any one of them, and it is an established rule of law, that all acts *in pari materia* are to be taken together, as if they were one law. [Footnote omitted.]

[9] While both Mid-Con and the United States are critical of the amount of the $100 fee in MCL 478.2(2), it should be noted that the decision where to plate and operate a vehicle is dependent on a wide range of economic variables. In this regard, Michigan has a number of economic factors that may significantly reduce the costs to motor carriers, including: increased weight limits (maximum 160,000 pounds allowance), no vehicle property tax, a staggered renewal process, and Michigan no-fault insurance requirements for public liability and property damage.

F. The State court precedents relied upon by Mid-Con do not support the conclusion that Section 14504 preempts MCL 478.2(2).

Mid-Con quotes *State Ex Rel Sammons Trucking, Inc v Boedecker,* 492 P2d 919 (1972) for the proposition that "Congress has pre-empted the field of state regulation and identification of interstate motor vehicles using Montana highways." (Mid-Con Brief, p 18.) This quotation, however, is not only inconsistent with the well-established principle that Congress has not preempted the field of state regulation of interstate motor vehicles, but directly contradicts another case cited in the same section by Mid-Con, i.e., *Roadway Express, Inc v State Treasurer,* 458 NE2d 66, 68 (1983), which held that Congress, in choosing to regulate transportation through the Interstate Commerce Act, did not intend to preempt the field of regulation.

Sammons involved a challenge to certain Montana identification, registration and licensing procedures for motor vehicles. It was argued that these Montana procedures imposed greater and conflicting requirements than the bingo regulations that limited state registration fees to $5.00 per vehicle [since increased to $10.00]. Yet, *Sammons* did not involve any discussion of a *regulatory* fee. The issue addressed there related solely to the state's *registration* fee, which Montana had failed to reduce from $10.00 to $5.00 as required by the new federal regulation. *Sammons* did not address the question of a State's authority to charge per vehicle *regulatory* fees.

Mid-Con also cites to *State Ex Rel Sammons Trucking, Inc v Bollinger,* 544 P2d 1235 (1976). That case reviewed the Montana Legislature's amendment that reduced the $10.00 registration fee to $5.00, so as to comply with federal law. The amendment also redefined "motor vehicle" and made any trailer, semi-trailer or dolly attached to a motor vehicle subject to the $5.00 registration fee. The Montana Supreme Court found this provision conflicted with the federal motor carrier regulations that limited the

definition of motor vehicle to vehicles having a mechanical drive unit. Thus, there was an actual conflict between the federal and State statutes.

Mid-Con's citation to *Roadway Express* similarly misses the mark. *Roadway* held that the Illinois commerce Commission possessed the power to adopt a fee that exceeded the federal limit and was not preempted by Congress from doing so. 458 NE2d at 68. But while the additional fees were legally imposed the Court held they were illegally disbursed because under Illinois law the money was used for purposes other than motor carrier regulation. *Id.* at 70. This is not the case in Michigan inasmuch as the revenues from fees closely match the expeditures for motor carrier regulation. J.A. 28. Thus, Michigan's regulatory fee, under MCL 478.2(2), is not, like its federally-approved $10.00 registration fee, applied to all interstate vehicles in Michigan. This regulatory fee is applied only when actual vehicular "presence" in Michigan is demonstrated, by commercially license plating the fee-paying vehicle in this state. Therefore, the Michigan Court of Appeals correctly recognized that Mid-Con confused the issue, noting that Michigan has complied with the SSRS through MCL 478.7(4) and that MCL 478.2(2) is unrelated to the purpose of the SSRS. J.A. 80, 83-84.

CONCLUSION

In 03-1230, even if the intrastate fee is analyzed as a tax, it is nonetheless constitutionally valid. This is because it falls within the exception set forth in *Scheiner,* that an unapportioned flat tax will not be found to violate the Commerce Clause when it is the only practicable means of collecting revenue from users and the use of a more finely gradated tax would pose genuine administrative burdens.

This Court should reject ATA's attempt to radically expand the scope of this Court's holding in *Scheiner* such that virtually any flat, unapportioned State assessment will constitute a violation of the Commerce Clause. ATA seeks to extend the internal consistency principle, which has been described as

requiring the invalidation of "any unapportioned flat tax on multistate activities" (*Id* at 303-304, Scalia J., dissenting), to include the invalidation of any fee on solely intrastate activities that *may* have an indirect, yet entirely unproven, effect on interstate commerce. Moreover, the questionable, hypothetical benefit to free trade occasioned by the striking down of the intrastate fee would come at the expense of the safety of Michigan's citizens.

ATA derides the distinction employed by the Michigan Court of Appeals between a regulatory fee and a tax under a Commerce Clause analysis, but fails to recognize the important policy considerations involved. Highway safety in the several States is not a one-size-fits-all proposition. The States should be afforded the flexibility to implement a fee-based highway safety program that is responsive to local conditions and concerns. Sacrificing the safety of the public on the States' highways under the banner of free trade unnecessarily frustrates the State's police powers to enact regulations to promote and protect the health, safety and welfare of its citizens. The approach taken by the Michigan Court of Appeals is the better approach in that it balances the legitimate concerns of the States to protect its citizens through the exercise of police powers with ensuring free trade among the States, while requiring actual, rather than hypothetical, facts to support any claim of discrimination.

In 03-1234, this Court should reject the claim that Section 14504 preempts the interstate fee. Neither the text of Section 14504 nor Congressional purpose in enacting the SSRS support the expansive reading that the Mid-Con and the United States attribute to it. The interstate fee is a regulatory fee that does not conflict with or stand as an obstacle to the Congressional objective of simplifying interstate registration requirements. This is made clear by an examination of the Michigan fee system as a whole which demonstrates that the interstate motor carrier vehicle is not singled out for disparate treatment. The Michigan Court of Appeals correctly found that Section 14504 did not preempt MCL 478.2(2).

Should this Court, however, issue an adverse decision against the Respondents in either 03-1230 or 03-1234, the Court should not require the payment of refunds to taxpayers, but should instead remand the case to the Michigan courts to determine how to apply this Court's holding, as it has in other cases where this Court has invalidated a state tax or fee. *See, Tyler Pipe,* 433 US at 251-253; *Bacchus Imports, Ltd,* 468 US at 276-277 (1984); *Williams v Vermont,* 472 US 14, 28 (1985).

The decision of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

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